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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GILBERT L. DOZIER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the prohibition in the Hobbs Act, 18 U.S.C. 1951, against extortion "under color of official right" applies to solicitations of political contributions by a public official without proof of force, threats or use of fear.

2. Whether that portion of the Act, if applicable to such conduct, is void for vagueness.

3. Whether a governmental agency under the control of an elected public official constitutes an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion and judgment of the court of appeals (App. A, *infra*, pp. 1a-30a) is reported at 672 F.2d 531 (5th Cir. 1982). A memorandum opinion of the district court, denying petitioner's motion to dismiss Count One of the indictment (App. B, *infra*, pp. 31a-32a), is reported at 493 F. Supp. 554 (M.D. La. 1980). The trial court's order denying motions for a judgment of acquittal and for a new trial (App. D, *infra*, p. 35a) is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976). The opinion and judgment of the court of appeals were entered on April 8, 1982, and a timely petition for rehearing and suggestion for rehear-

ing *en banc* were denied by order dated May 13, 1982 (App. C, *infra*, p. 32a). This petition is timely filed within 60 days of that date.

STATUTES INVOLVED

The Hobbs Act, 18 U.S.C. § 1951 (1976), provides in pertinent part as follows:

> **§ 1951.** Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The portion of the Racketeer Influenced and Corrupt Organizations statute under which the petitioner was charged, 18 U.S.C. § 1962(c) (1976), provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The definitional section of the RICO statute, 18 U.S.C. § 1961 (1976), provides in pertinent part as follows:

> As used in this chapter—
>
> . . .
>
> (4) "enterprise" includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . . .

STATEMENT

A. The Offenses Charged

The petitioner, formerly the elected Commissioner of Agriculture of the State of Louisiana, was convicted on one count under the RICO statute, 18 U.S.C. § 1962(c) (1976), and three counts under the Hobbs Act, 18 U.S.C. § 1951 (1976). The RICO count charged Dozier with conducting the affairs of the Department through a pattern of "racketeering activities," which consisted of solicitations of funds by Mr. Dozier from persons or businesses that were subject in some manner to regulation by the Louisiana Department of Agriculture. The indictment characterized these solicitations as both violations of the Hobbs Act and bribery under state law. In Counts Two through Five, four of the solicitations were charged as separate offenses under the Hobbs Act.

The allegations of the indictment tracked the statutory language, and identified the alleged "victims" and the sums solicited. Contrary to the belief of the court of appeals, however, the indictment did not identify specific

official actions—"quid pro quos"—that Dozier allegedly promised to take or withhold in exchange for money.[1]

B. The Motion To Dismiss The RICO Count

Before trial, the defense moved to dismiss the RICO Count on the ground (now presented in this Petition) that the Louisiana Department of Agriculture, a public agency headed by an elected official, could not be an "enterprise" for purposes of the RICO statute. The trial court denied the motion (p. 31a, *infra*), relying on previous Fifth Circuit rulings on similar contentions.

C. The Evidence At Trial

The trial lasted three weeks. The government's theory was that Dozier attempted to obtain funds from persons who needed assistance or feared unfavorable action from the Department of Agriculture by leading them to believe that he would assist them if they made contributions. The evidence showed that following his election in December 1975, Dozier sought funds to pay his campaign deficit, and began to plan—and to seek political contributions—for an anticipated race for Governor four years later. In 1979, he decided rather to campaign for reelection as Commissioner of Agriculture, but was defeated for reelection and left

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[1] The court of appeals stated that the indictment "was rife with 'specifically identifiable' *quid pro quos*" (p. 12a, n.4 *infra*), and described the "allegations" as including specific promises or threats made by Dozier in connection with attempts to obtain funds (pp. 2a-3a, *infra*). In fact, only one *quid pro quo* was alleged in the entire indictment: a promise to Temple Brown, a dairy owner, that Dozier would make him "the czar of the milk industry" if he raised money for Dozier from dairy owners across the State. This alleged *quid pro quo* was not argued to the jury by the prosecutor, nor was it mentioned by the court of appeals, as the claimed basis for the extortion charge.

office in March 1980. The alleged acts of attempted extortion or bribery occurred on various dates between his initial election and his defeat in the reelection campaign.

The evidence on two of the charges, viewed in the light most favorable to the government, is set out in the opinion of the court of appeals (*infra*, pp. 8a-9a). The government's witnesses on other charges in the indictment also testified to conduct by Dozier from which, with varying degrees of clarity, it could be inferred that they would be helped or hurt depending on their willingness to contribute. Dozier, who testified in his own behalf, denied that he expressly or impliedly tied his requests for contributions to official actions on any of the occasions described in the indictment.

While the evidence was sufficient to support the verdicts, when viewed in the light most favorable to the government, it was not so compelling as to make the jury's decision an easy one. The evidence showed that of the eleven[2] victims of Dozier's alleged extortion, only four raised or contributed any funds to him at all, and of those four, none received the official action they testified that they sought. Of the remaining seven "victims," from whom Dozier allegedly attempted to obtain in excess of $275,000, none contributed any money, yet five did receive the official action they sought. The government's lead witness on the first of the charges described in the opinion of the court of appeals, Loy Weaver, while strongly suggesting in his trial testimony that he believed Dozier was seeking a *quid pro quo* for favorable action on an auction barn charter, admitted that on an earlier occa-

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[2] One predicate offense alleged in the indictment was dismissed on the government's motion prior to trial.

sion he had testified quite differently. Mr. Weaver—a former FBI and DEA agent—had stated to a legislative committee fifteen months before the trial as follows (Tr. 216-217):

> . . . [I]n my opinion, Mr. Dozier did not violate the law. In your opinion, maybe he did, but I don't think he did.
>
> . . . He has every right to solicit campaign contributions and I don't deny that. I think the setting was wrong. I think the technique was wrong but that is a political consideration and not a question of criminal prosecution in my judgment. . . . Mr. Cain, you know there is a very very thin line between what is legitimate solicitation of contributions and what is a veiled threat. Anytime you go to your enemy and ask for a contribution, you could call that a threat.

Another witness, Floyd Volentine, while stating on direct examination (over objection) that he considered Dozier's requests for political contributions from groups of auction barn owners to have been "blackmail" and "morally wrong," described on cross-examination what Dozier actually said, as follows (Tr. 892):

> Mr. Dozier stated he was heavily in debt as a result of his campaign for Commissioner; that he wanted $30,000 out of the auction market people, that would come to about $1000 apiece; he was going to make us the best Commissioner of Agriculture that this state has ever had; he was going to be able to help us; he was going to be able to help us; he was going to put the State—the private veterinarians back in the market place, and that he was going to get the fee raised that was paid the auction markets for assisting in testing the brucellosis.
>
> That's the only pitch, Mr. Gravel, he made. . . .

The trial court's instructions on the Hobbs Act, which applied to the predicate offenses under RICO and the

substantive Hobbs Act counts, permitted the jury to find a violation on either of two alternative theories: extortion (1) through the "use of actual or threatened force, violence, or fear" or (2) "under color of official right."[3] It described the latter as "the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear," and defined the term "wrongful" to mean "the obtaining of property unfairly and unjustly by one having no lawful claim thereto." Tr. 3274. Nowhere did the court's instructions suggest that a conviction could be based only on a showing that Mr. Dozier had solicited funds in exchange for specified official actions—*i.e.*, a *quid pro quo*.

The jury returned guilty verdicts on the RICO count and three of the four Hobbs Act counts, and a not guilty verdict on the remaining count. The defense filed a post-trial motion for a judgment of acquittal on the grounds (now the subject of this Petition) that the Hobbs Act does not apply to non-coercive solicitations as a matter of statutory construction and that, as construed in binding Fifth Circuit precedent and as described to the jury, it is unconstitutionally vague as applied to solicitations of political contributions. The trial court denied the motion without opinion.

D. The Decision Of The Court Of Appeals

On appeal, the petitioner explicitly raised the point that the Hobbs Act's proscription of extortion "under

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[3] Accordingly, the legal sufficiency of each of these theories is before the Court. Where it cannot be known which of two theories a jury chose, a defect in either requires reversal. *See Leary* v. *United States*, 395 U.S. 6, 31-32 (1969); *United States* v. *Rodriguez*, 465 F.2d 5, 10 (2d Cir. 1972).

color of official right" does not apply to attempts to obtain funds without proof of force, threats, or use of fear, but did not further argue the point in deference to the prior rejection of that contention by a panel of the Fifth Circuit in *United States* v. *Williams*, 621 F.2d 123 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981).[4] Likewise, the petitioner explicitly raised but did not argue at length the point that a governmental entity is not an "enterprise" for the purpose of the RICO statute, in deference to the rejection of that argument by a panel of the Fifth Circuit in *United States* v. *Brown*, 555 F.2d 407, 416 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The petitioner urged the full court to consider both contentions in a petition for rehearing *en banc*, which was denied without opinion.

The opinion of the court of appeals did address the petitioner's contention that the Hobbs Act, insofar as it punishes attempts to obtain funds "under color of official right," is void for vagueness as applied to the solicitation of political contributions. The Court declined to decide the constitutional sufficiency of previous interpretations by the Fifth and other Circuits of the standards necessary for conviction under the Act, which had defined the offense to include two elements: (1) that the public official sought or obtained funds "knowing he was not entitled to them in the discharge of his lawful duties," and (2) that the payments were "induced by his official position," *United States* v. *Williams*, *supra*, 621 F.2d at 126, or that "the motivation for the payment focuse[d] on the reci-

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[4] The Fifth Circuit follows "the absolute rule that a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc." *Bonner* v. *City of Prichard, Alabama*, 661 F.2d 1206, 1209 (11th Cir. 1981).

pient's office," *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). Rather, the court of appeals upheld the validity of the Act on the basis that it prohibits a public official from "conditioning performance of official acts on the payment of fees in the name of contributions." P. 10a, *infra*.[5] Relying on the erroneous impression that the indictment charged "'specifically identifiable' *quid pro quos*" offered by Mr. Dozier in exchange for funds,[6] and finding the evidence sufficient to establish that Dozier "demanded specific amounts of money for specific favors," p. 12a *infra*, the court found that his conduct fell "within the 'hard core' of the statute's proscriptions." *Id.* (quoting from *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973)). It therefore held that he was not in a position to complain of the vagueness of the Act as applied to political fund-raising activities "on the margin of the law." *Id.*

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[5] At other points in the opinion, the Court expressed the test in only slightly different terms. "Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act." p. 7a, *infra*. "[A]ny public officer, elected or otherwise, who makes performance (or nonperformance) of an official act contingent upon payment of a fee—whether or not the fee actually is paid or the act actually performed—is guilty of extortion 'under color of official right.'" pp. 13a-14a, *infra*.

[6] See note 1, p. 4 *supra*.

REASONS FOR GRANTING THE WRIT

A. The Court Of Appeal's Ruling That The Hobbs Act Is Applicable In The Absence Of Coercion Extends The Statute Beyond Its Intended Limit

The decision below is the latest of a recent series of cases in which the courts of appeals have held that a public official may be convicted of extortion "under color of official right" without any proof of "threat, fear, or duress," beginning with *United States* v. *Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). Prior to *Kenny*, the courts uniformly required a showing of coercion for a conviction under the Hobbs Act. For example, in *United States* v. *Hyde*, 448 F.2d 815, 833 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972), the Fifth Circuit distinguished extortion under the Hobbs Act from the offense of bribery in which the victims were "willing participants":

> The distinction [of extortion] from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim.

See United States v. *Addonizio*, 451 F.2d 49, 72 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972); *United States* v. *Kubacki*, 237 F. Supp. 638, 641-42 (E.D. Pa. 1965).

Without substantial discussion and without acknowledging the novelty of its holding, the court in *Kenny* repudiated the well-established distinction between extortion and bribery and held, for the first time, that extortion "under color of official right" does "not require proof of threat, fear, or duress." 462 F.2d at 1229. A number of cases have followed *Kenny* without substantial independent consideration of the issue that the Third

Circuit resolved so peremptorily.[7] Thus, the Hobbs Act has been extended to any case in which a defendant has "accepted . . . money and gratuities, knowing he was not entitled to them in the discharge of his lawful duties, and that payment was induced by his official position," *United States* v. *Williams*, 621 F.2d 123, 126 (5th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), with only cursory attention to whether this construction is valid.

Putting aside for the moment the difficulty of applying this test to political fund-raising activities, which was acknowledged by the court below, these holdings have divorced the Hobbs Act's proscriptions from their focus on coercion and have made of the Act a vehicle for the prosecution of conduct not contemplated by Congress to fall within its reach. Both the error of the *Kenny* rule and its "revolutionary" implications for federal prosecutions of public officials were carefully reviewed by Judge Aldisert in *United States* v. *Cerilli*, 603 F.2d 415, 426-27

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[7] *United States* v. *Hathaway*, 534 F.2d 386, 393 (1st Cir.), *cert. denied*, 429 U.S. 819 (1976); *United States* v. *Trotta*, 525 F.2d 1096, 1100 n.7 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States* v. *Harding*, 563 F.2d 299 (6th Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978); *United States* v. *Staszcuk*, 502 F.2d 875, 878 n.5 (7th Cir. 1974), *modified in other respects*, 517 F.2d 53 *(en banc)*, *cert. denied*, 423 U.S. 837 (1975); *United States* v. *Brown*, 540 F.2d 364, 371-72 (8th Cir. 1976); *United States* v. *Braasch*, 505 F.2d 139, 151 n.7 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *United States* v. *Hall*, 536 F.2d 313, 321 (10th Cir.), *cert. denied*, 429 U.S. 919 (1976). Only *Harding* engaged in any independent consideration of the issues, and the Eighth Circuit there characterized its analysis as "a few additional words of explanation" for its agreement with "other courts which have considered the issue." 563 F.2d at 302.

(3d Cir. 1979) (dissenting opinion), *cert. denied*, 444 U.S. 1043 (1980), who summarized his conclusion as follows:

> It is now my view that our interpretation in *Kenny* and its progeny is not supported by the legislative intent underlying the Hobbs Act nor is it historically accurate. I believe that our failure to reexamine its rationale has resulted in a perpetuation of erroneous law not only in this circuit but in the First, Second, Fourth, Seventh, Eighth and Tenth Circuits which have followed our lead without setting forth a reasoned elaboration for their conclusions.

When a panel of the Fifth Circuit first adopted the *Kenny* rule, Judge Tate wrote separately to state "for benefit of en banc consideration or further review," that it was "clear" to him "that the congressional intent to punish racketeering by extortion, with penalties of up to twenty years imprisonment, included that the extortion be by coercion, economic or otherwise." *United States* v. *Williams*, *supra*, 621 F.2d at 126. Indeed, even Judge Gibbons, who wrote the opinion in *Kenny*, has written in dissent to criticize the extension of the Hobbs Act to certain forms of non-coercive conduct now encompassed within the interpretation applied by the courts of appeals. *See United States* v. *Mazzei*, 521 F.2d 639, 646-56 (3d Cir. 1975) *(en banc)*, *cert. denied*, 423 U.S. 1014 (1975) (Gibbons, J., dissenting). And a former United States Attorney and head of the Watergate Special Prosecution Force, after reviewing the uses to which the Hobbs Act has recently been put, has written:

> Given this flurry of prosecutorial activity, it is appropriate to consider whether the original theory of the *Kenny* prosecution is supportable either as a matter of legislative intent or as a matter of historical accuracy. If substantial uncertainty exists on both these counts, it must then be asked whether courts should continue to accept the broad interpretation of

> the Hobbs Act espoused by the Government, given the vast potential for federal intrusion into state and local law enforcement that such an interpretation entails.

Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo.L.J. 1171, 1178-79 (1977).

B. The Hobbs Act Standard For Extortion Under Color Of Official Right, Under Which Petitioner Was Tried And Convicted, Is Unconstitutionally Vague.

For the reasons stated above, this Court should grant certiorari to decide whether extortion "under color of official right" under the Hobbs Act applies without proof of threats, force, or duress. Even if the *Kenny* rule is a proper construction of the Act, however, the effort of the court below to save that construction from the vice of vagueness as applied to the solicitation of political contributions represents both an unsettling departure from prior law and an unlawful affirmance of the petitioner's conviction on a legal theory upon which he was not tried.

Prior to the decision of the Fifth Circuit in this case, the prevailing requirement for conviction of extortion "under color of official right" was that the defendant sought or accepted funds "knowing he was not entitled to them in the discharge of his lawful duties, and that payment was induced by his official position." *United States* v. *Williams*, *supra*, 621 F.2d at 126. Other courts had set forth the standard in similar terms: "So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951." *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States* v. *Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

Ordinarily, a public official has no business accepting money to which he is not "lawfully entitled" by reason of contract, honorarium or the like, and where he does so, he has reason to know that he is in danger of criminal prosecution. The further requirement in such a case that the payment be "induced by his official position" is one that—while far from precise—may afford a sufficient standard to meet the notice requirement of a criminal statute. But where the solicitation or payment in question is a political contribution, the formulation breaks down entirely, for a public official is *never* "lawfully entitled" to a political contribution, yet he *must* solicit and receive them if he is to campaign for election or reelection.

That fact leaves such an official, under the prevailing interpretation of the Hobbs Act, with a single standard to define the difference between a criminal offense carrying a 20-year prison sentence, and a lawful receipt of a political contribution: whether the contribution is "induced" or "motivated" by his office. It does not require extended discussion to demonstrate the precarious position such a vague standard creates for candidates who know that large contributors to their campaigns hope for and expect a sympathetic ear for the needs and the views of their industry, trade union, profession, or other special interest. As the District of Columbia Circuit observed in reversing a conviction for failure adequately to instruct the jury on the difference between bribery, unlawful gratuity, and innocent receipt of funds, "No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation." *United States* v. *Brewster*, 506 F.2d 62, 81 (D.C. Cir. 1974).

In short, the interpretation of the Hobbs Act under which the petitioner was indicted and tried is so vague when applied to solicitations of political contributions that people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

Furthermore, the demand for specificity in this context is particularly urgent because the activity in question is protected by the First Amendment. This Court recognized in *Buckley* v. *Valeo*, 424 U.S. 1, 19, 21 (1976), that "virtually every means of communicating ideas in today's mass society requires the expenditure of money" and thus that fund-raising is "necessary for effective advocacy." When a statute is capable of reaching first-amendment activity, this Court has "demand[ed] a greater degree of specificity than in other contexts." *E.g.*, *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974); *Parker* v. *Levy*, 417 U.S. 733 (1974). "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone.' " *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972).[8]

In response to the petitioner's challenge to the constitutionality of the Hobbs Act as applied to solicitations

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[8] Apart from its tendency to chill a necessary element of modern first-amendment activity, the prevailing interpretation of the Hobbs Act creates an unacceptable risk of selective and arbitrary enforcement. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 109 (citing many cases). This risk is particularly severe and intolerable in the area of political activity. This Court's review is appropriate to assure that controversial or unpopular candidates are not singled out by prosecutors or convicted by juries guided by standards as vague as those now embodied in the Hobbs Act.

of political contributions, and recognizing the validity of these concerns, the court below expressly disavowed that the formulation it had earlier announced in *United States* v. *Williams*, *supra*, was intended as "a well-chiseled standard in that context," *infra*, p. 6a n. 1. It also declined to accept the Second Circuit's formulation of extortion "under color of official right" set forth in *United States* v. *Trotta*, *supra*. Rather, it adopted a totally new standard to define the offense of extortion "under color of official right," as follows: "[A] public official may not demand payment as inducement for the promise to perform (or not to perform) an official act." *Infra*, p. 7a.[9]

By interpreting the statute, when applied in the context of political contributions, as a prohibition against the demand for or receipt of money in exchange for the promise or performance of an official act, the court below has made the Hobbs Act a bribery statute applicable to all state and local public officials whenever their duties impact on interstate commerce. That Congress never intended the Hobbs Act as such a criminal statute is evidenced not only by the legislative history and previous interpretations of the Act, but by other Congressional action. When Congress set out to prohibit the solicitation of political contributions as a condition to the performance or nonperformance of an official act by a state or local official, it did so in plain language—and made the offense

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[9] The court did not say whether this standard—requiring proof of a *quid pro quo*—is to be applied only in the context of political contributions or is to be applied generally under the "under color of official right" portion of the Hobbs Act.

punishable as a misdemeanor, rather than by 20 years imprisonment as provided in the Hobbs Act. [10]

Furthermore, even if the court of appeals' construction of the statute were consistent with the language and history of the Act and sufficient to save it from the vice of vagueness, it could not be retrospectively applied in this case. This Court has recognized that an appellate court may not reject a vagueness challenge on the basis of a narrowing construction that was not available to the trier of fact. *E.g.*, *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 92 (1965); *Gregory* v. *Chicago*, 394 U.S. 111, 118-24 (1969) (Black, J., concurring). *See Cole* v. *Arkansas*, 333 U.S. 196 (1948); *Stromberg* v. *California*, 283 U.S. 359 (1931); *Dunn* v. *United States*, 442 U.S. 100 (1979). When a jury has not had an opportunity to apply a limiting construction, the appellate court is "unable to say" that the conviction did not rest on "an unconstitutional construction" of the statute. *Shuttlesworth* v. *City of Birmingham*, *supra*, 382 U.S. at 92. Thus, an affirmance violates the defendant's right to have a jury apply proper standards to

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[10] Section 601 of Title 18, United States Code, provides as follows:

> Whoever, directly or indirectly, knowingly causes or attempts to cause any person to make a contribution of a thing of value (including services) for the benefit of any candidate or any political party, by means of the denial or deprivation, or the threat of the denial or deprivation, of
>
> (1)any employment, position, or work in or for any agency or other entity of the Government of the United States, a State, or a political subdivision of a State, or any compensation or benefit of such employment, position, or work; or
>
> (2)any payment or benefit of a program of the United States, a State, or a political subdivision of a State;
>
> if such employment, position, work, compensation, payment or benefit is provided for or made possible in whole or in part by an Act of Congress, shall be fined not more than $10,000, or imprisoned not more than one year, or both.

his case. In this case, the record confirms that Mr. Dozier was not tried on the theory on which his conviction was affirmed.

a. The indictment was phrased in the language of the statute and thus did not suggest that a "*quid pro quo*" was required for a conviction.

b. The operative jury instruction on the Hobbs Act did not require a *quid pro quo*, but rather only a "wrongful taking . . . whether or not the taking was accomplished by force, threats, or use of fear."[11] "Wrongful" was defined to mean "the obtaining of property unfairly and unjustly by one having no lawful claim thereto."

c. Under the Louisiana Bribery Statute, the prosecutor argued for a conviction without any showing of a *quid*

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[11] The instructions delivered at trial regarding extortion "under color of official right" included the following (Tr. 3274):

> Extortion under the color of official right is the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion. So, if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question.

The government has relied heavily in its prior filings on the last two sentences of this instruction, to which the defendant did not object. However, it is clear that these sentences are designed only to address a defense sometimes offered to justify otherwise "wrongful takings," a claim that an official's action was one which he was duty-bound to take even if improperly motivated. *See, e.g., United States* v. *Hyde*, 448 F.2d 815, 832-33 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972). They did not limit the category of actions punishable under the first, definitional sentence.

pro quo, confirming that the government's view was that political contributions could be punished on terms different than those later announced by the Fifth Circuit (Tr. 3029):

> [I]t is not necessary that bribery solicited be for a specific act, or what we may call a quid-pro-quo. It's only necessary that it be solicited--with the various things, of course, specific intent and other law that the court will read to you that require that it be solicited with the intent to influence him in the conduct of his office, not for a specific thing, but general. [12]

To be sure, the prosecutor attempted at trial to prove that Mr. Dozier's solicitations did involve *quid pro quos*. However, the jury was never instructed to resolve that question to determine the petitioner's guilt or innocence. A conviction on a theory not presented to a jury cannot be upheld solely because there is "no glaring distinction between the Government's theory at trial and the [court of appeals'] analysis on appeal." *Dunn* v. *United States*, *supra*, 442 U.S. at 107. The constitutionality of the vague construction of the Hobbs Act under which Mr. Dozier was convicted is squarely presented for review.

C. A Governmental Agency Headed By An Elected Official Is Not An "Enterprise" Within The Meaning Of 18 U.S.C. § 1961

Whether a governmental agency under the control of an elected public official may be deemed an "enterprise"

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[12] The prosecutor was arguing from the following jury instruction concerning the Louisiana Bribery Statute (Tr. 3244-45):

> The inquiry . . . is whether the political contribution is made or solicited *not as [a] quid pro quo for specific action*, but with the intent to influence the conduct of the public servant in relation to his position, employment or duty. (Emphasis added).

within the meaning of the federal racketeering statute is an important question regarding the construction of a significant federal criminal statute that this Court has not yet resolved.[13] As this case amply demonstrates, the Department of Justice persistently prosecutes alleged offenses by individual public officials under the theory that all public agencies are enterprises. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165, 205 (1980). The holding of the court below that such a use of the RICO statute is proper is squarely contrary to the statutory language and history, as reviewed and explained by a panel of the Sixth Circuit in a decision now under reconsideration *en banc*. *United States* v. *Thompson*, ____ F.2d ____ (6th Cir. Feb. 8, 1982), petition for rehearing *en banc* granted March 26, 1982.[14] The significance of the issue fully justifies the

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[13] Whether public corporations or boards that amount merely to state-operated commercial ventures engaged in interstate commerce qualify as "enterprises" under the statute is not in question here. *See United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied sub nom., Millhouse* v. *United States*, 434 U.S. 1072 (1978); *United States* v. *Barber*, 476 F. Supp. 182 (S.D. W.Va.), *aff'd mem. sub nom. Vignola* v. *United States*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980). These entities do not perform "traditional governmental functions," *National League of Cities* v. *Usery*, 426 U.S. 833, 852 (1976), but rather share a common goal—profit maximization—with private business enterprises. *See* J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, 370 (1978) (distinguishing "essentially governmental" state functions, which are not subject to federal taxation, from those that are "proprietary (business) in nature and properly taxed"); *Ohio* v. *Helvering*, 292 U.S. 360 (1934).

[14] The *Thompson* case, which involved the Office of the Governor of the State of Tennessee as the alleged "enterprise," was reargued *en banc* on April 26, 1982, and no decision has yet been issued.

Department of Justice's conclusion in its petition for rehearing in *Thompson*, as follows:

> The importance of the issue in this case is hard to overstate. . . . We believe that the issue presented in this case [is] equal in importance to the question of whether the racketeering statute reaches illegitimate as well as legitimate enterprises, a question which . . . was ultimately resolved by the Supreme Court.

As this Court recently confirmed, *United States* v. *Turkette*, 452 U.S. 576 (1981), the statutory definition of "enterprise" is, on its face, broad and unambiguous. Close scrutiny of 18 U.S.C. § 1961(4) (1976) reveals, however, that it is unambiguous only with respect to the *form* that an enterprise may take; the definition does not address the *purpose* for which an enterprise exists. Business, both legal and illegal, may be conducted in many forms, and it was Congress' clear intention that RICO would cover all of these forms. But the word "enterprise" implies an economic, profit-seeking orientation that did not escape Congress' attention. In fact, the legislative history "is replete with examples of legislators' use of the word 'business' synonymously with the statutory concept of 'enterprise.' " Note, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 Vand. L. Rev. 441, 474 (1980). Congress could not have meant, for example, that every individual *is* an enterprise, but only that every individual, like every legal or nonlegal entity, *can be* an enterprise if he pursues certain economic goals. Because most state agencies do not pursue the goals that characterize "enterprises" as Congress understood that term, they do not fall within the statutory definition. This argument has not been addressed by any of the courts of appeals.

Other internal evidence of RICO's scope confirms this interpretation of "enterprise." Sections 1962(a) and 1962(b) clearly contemplate that an enterprise is something in which one can invest and hold a property interest, and applying RICO's civil remedies to state agencies would yield anomalous results. Section 1964(a) authorizes district courts not only to prohibit "any person from engaging in the *same type of endeavor* as the enterprise engaged in," but also to order "dissolution or reorganization of *any* enterprise." 18 U.S.C. § 1964(a) (1976) (emphasis added). It is inconceivable that Congress would or could have sanctioned the use of such sweeping remedial power against state agencies that undertake only traditional governmental functions. The "primacy" of RICO's remedial provisions and their "total inapplicability . . . to governmental entities corroborate what the legislative history demonstrates: Congress had no intention of including governmental units within the ambit of the 'enterprise' provisions . . . ." *United States* v. *Grzywacz*, 603 F.2d 682, 691 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 446 U.S. 935 (1980). [15]

The importance of the issue and its implications for use of the draconian RICO statute in federal prosecutions of state and local officials are apparent. Given the split of

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[15] Contrary to the conclusion of one court, *United States* v. *Sisk*, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1979), the enumeration of bribery and extortion as "racketeering activities" in 18 U.S. § 1961(1) provides no evidence that a governmental entity may constitute an "enterprise." That an agency performing traditional governmental functions is not a RICO enterprise does not mean that the Act "cannot be used to reach corruption of government by organized outside forces . . . [or] that public officials are immune from RICO actions. . . . Following *Turkette*, the corrupting organizations may

opinion on the issue among judges of the courts of appeals (including one panel holding, now under *en banc* review, that squarely conflicts with the decision of the court below), the issue plainly warrants review by this Court.

CONCLUSION

For the reasons set forth herein, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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themselves be charged as RICO enterprises, and the evils Congress feared and legislated against can be fought." *United States* v. *Thompson*, *supra* (slip op. at 11). If the government can demonstrate a proper RICO enterprise, bribery and extortion are chargeable offenses, but this does not suggest that the inclusion of those offenses was intended to alter the commonly accepted link between "enterprise" and the business of making money.

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GILBERT L. DOZIER,
Defendant-Appellant.

No. 80-3927.

United States Court Of Appeals,
Fifth Circuit.

April 8, 1982.

Appeal from the United States District Court for the Middle District of Louisiana.

Before WISDOM, SAM D. JOHNSON and WILLIAMS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge.

Gilbert L. Dozier was elected Commissioner of Agriculture of the State of Louisiana on December 13, 1975, and took office on May 10 of the following year. His bid for reelection in December, 1979, conducted in the midst of a publicized federal investigation of his activities as Commissioner, was unsuccessful. In January, 1980, a federal grand jury returned a five-count indictment against Dozier.

Count One charged that Dozier had violated the Racketeer Influence and Corrupt Organization (RICO) statute, 18 U.S.C. § 1962(c) by conducting the affairs of the Louisiana Department of Agriculture—an "enterprise" within the meaning of 18 U.S.C. § 1961(4)—through a pattern of racketeering activities. In all, Count One described twelve separate acts of racketeering that Dozier allegedly had committed between December 1975 and October 1979. Each allegation depicted Dozier's solicitation of money from a person or business that was or might have been affected by some action of the Louisiana Department of Agriculture. Briefly, the twelve allegations, designated by letters in the indictment, were as follows:

(A) That Dozier, in August 1978, attempted to solicit $10,000 from Edward Simpson, owner of a livestock auction barn, in return for providing a charter through the Livestock Charter Commission and Sanitary Board;

(B) That Dozier, in November 1978, extorted $10,000 from Floyd "Shorty" Giles by promising to deliver an auction barn charter;

(C) That Dozier, in early 1976, attempted to extort $200,000 from Louisiana milk processors through Temple Brown, presi-

dent of Brown's Velvet Dairy, in return for a promise to lower the price of milk;

(D) That Dozier, in May 1976, extorted $4,900 from Walter Davis by promising to provide a pesticide license;

(E) That Dozier, in August 1979, attempted to extort $20,000 from Alvin "Bugs" Burger, owner of a pest control company, in return for using his influence with the Louisiana Structural Pest Control Commission, which had questioned Burger's ability to supervise his Louisiana concerns while residing in Florida;

(F) That Dozier, in July or August 1979, threatened the owner of an aerial crop dusting service, Roy True, with shutdown unless True paid him $2,000;

(G) That Dozier, in April 1978, asked James Pruitt for $10,000 in return for securing him a seat on the Louisiana State Market Commission;

(H) That Dozier, from January to May 1977, attempted to extort $25,000 from Nicholas Fakouri and the Vermillion Dairymen's Cooperative Association in return for a loan guarantee from the State Market Commission;

(I) That Dozier, from January to September 1976, attempted to solicit a kickback of $10,000 from consultants Burk & Associates in return for contracts on a proposed New Orleans Food Distribution Center;

(J) That Dozier, from January to September 1976, attempted to extort $20,000 from the Louisiana Computer Company in return for favorable treatment from the state;

(K) That Dozier, throughout 1976, attempted to solicit $1,000 from each member of the Louisiana Livestock Market Association in return for a promise to restore state-compensated private veterinarians to the auction markets and to raise the fees charged by the markets on tests for cattle brucellosis;

(L) That Dozier, in March 1976, accepted a bribe of $2,000 from John Lambert in return for promising to help Lambert obtain a job in the Department of Agriculture.

Count One also designated eleven of these twelve incidents (paragraphs A through K, *supra*) as violations of the Hobbs Act, 18 U.S.C. § 1951, and the Louisiana bribery statute, La.Rev.Stat.Ann. § 14:118 (West 1974 & Supp. 1981). One incident (paragraph L) was alleged only as a violation of the state bribery statute. Finally, Counts Two through Five isolated four of these alleged transactions (paragraphs B through E, *supra*) as separate offenses under the Hobbs Act.

The trial began on September 2, 1980. On September 23, the jury returned a verdict finding Dozier guilty on all counts except Count Four. The district court denied Dozier's motions for judgment of acquittal and for a new trial. On November 7, the court sentenced Dozier to five years imprisonment and a fine of $25,000 for the RICO conviction (Count One), to a consecutive five-year term of imprisonment on Count Two, and to five years of probation on Count Three. The court suspended the imposition of sentence on Count Five and, as to imprisonment only, on Count Three.

Dozier maintained throughout his trial that his various solicitations were nothing more than the ordinary fundraising activities of a public official faced with the financial burdens of electioneering. Pursuing this theme on appeal, Dozier contests the applicability of both RICO and the Hobbs Act to facts adduced by the government. Interspersed with these matters of statutory construction are protests regarding some of the court's rulings and its instructions to the jury. Having reviewed Dozier's arguments with care, we believe that the convictions must stand on every count. In giving our reasons, we will address these contentions in the order presented by the appellant.

I. Is The Hobbs Act Unconstitutionally Vague As Applied To Elected Officials?

The Hobbs Act prohibits the obstruction of commerce by extortion, which it defines as "the obtaining of property from another, with his consent, induced by wrongful use or actual or threatened force, violence, or fear, or *under color of official right.*" 18 U.S.C. § 1951(b)(2) (emphasis supplied). Only last year we joined eight other circuits in holding "that Hobbs Act violations based on extortion by a public official need not included proof of threat, fear, or duress." *United States* v. *Williams*, 621 F.2d 123, 124 (5th Cir. 1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981). Our decision in *Williams* reinstated a jury verdict convicting an elected school board member who had solicited and received airline tickets and cash from a contractor doing business with the school board. In so doing, we overturned the district court's conclusion that the phrase "obtaining . . . under color of official right" is unconstitutionally vague.

Dozier necessarily concedes, therefore, that application of the Hobbs Act to punish solicitation of funds by an elected official is established precedent in this circuit. He seeks to distinguish *Williams*, however, by pointing out that the school board member convicted in that case made no attempt to characterize or explain his "donations" as legitimate political contributions. Dozier further submits that our rejection of the facial constitutional challenge posed in *Williams* does not preclude a holding that the Act's language is unconstitutionally vague *as applied* to an elected official confronted by the recurrent need to solicit and accept campaign contributions. As written and as previously interpreted, [1] Dozier continues, the

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[1] Dozier particularly attacks this court's language in *Williams* affirming the jury's conviction of an official because he "accepted money and gratuities, knowing he was not entitled to them in the discharge of his lawful duties, and that payment was induced by his official position." 621 F.2d at 126. Dozier maintains that campaign contributions necessarily are induced by an elected official's position

Act's injunction against taking money "under color of official right" provides no guidelines or protection for innocent fundraising and can only exert a chilling effect on this constitutionally protected activity.

The Supreme Court has recognized the important function of financial contributions in expressing support for candidates and fueling political debate. *E.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 21, 96 S.Ct. 612, 635, 46 L.Ed.2d 659 (1976); *Citizens Against Rent Control* v. *City of Berkeley*, ___ U.S. ___, ___-___, 102 S.Ct. 434, 435-436, 70 L.Ed.2d 492 (1981). Moreover, as Dozier is quick to point out, commentators and judges have expressed concern lest overzealous but unwitting fundraisers be swept up in a net originally intended for the truly venal. Criticizing a Second Circuit decision applying the Hobbs Act against a Commissioner of Public Works who had demanded campaign contributions from an engineering firm under contract to his department, one writer has observed:

> [I]f a public official who asks for a political contribution from one who does, or may do, business with the government can be prosecuted on proof of those facts alone, then the Hobbs Act has become an extraordinary mechanism for controlling political activity on the state and local levels. . . . If [*United States* v. *Trotta*, 525 F.2d 1096 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 [96 S.Ct. 2167, 48 L.Ed.2d 794] (1976)] means that a local government official commits extortion by soliciting a contribution from an organization that has or might have contacts with his agency, and is thereby liable to be imprisoned for twenty years, one may well ask whether a governor who attends a fundraising dinner and solicits contributions from the businessmen present has committed a felony.

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and that politicians are never "entitled" to donations. As Dozier himself points out, however, we were not addressing the problem of fundraising in *Williams* and did not intend, therefore, for the quoted phrase to serve as a well-chiseled standard in that context. This does not mean that the boundary between legal fundraising and extortion "under color of official right" is not discernible from the language and judicial history of the Act, as explained *infra*.

Ruff, *Federal Prosecution of Local Corruption. A Case Study in the Making of Law Enforcement Policy*, 65 Geo.L.J. 1171, 1196 (1977) (quoted in *United States* v. *Cerilli*, 603 F.2d 415, 437 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 728, 62 L.Ed.2d 728 (1980) (Aldisert, J., dissenting)). *See also Williams*, *supra*, 621 F.2d at 126 (Tate, J., concurring).

[1] Despite the reasonableness of these apprehensions, we remain unpersuaded that the Hobbs Act, as previously interpreted by this and other courts, discourages legitimate requests for political contributions. Our need to avoid hampering honest candidates who must solicit funds from prospective supporters does not require that the courts abandon this necessary, if troublesome, realm of political maneuver to those who would abuse its opportunities. A moment's reflection should enable one to distinguish, at least in the abstract, a legitimate solicitation from the exaction of a fee for a benefit conferred or an injury withheld. Whether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act.

[2, 3] In practice, of course, the fundraising defense makes detection of impropriety more difficult. Demands for money by an unelected official may constitute extortion *per se*; the latent power of office ordinarily is sufficient to taint such demands as coercive. *See, e.g.*, *United States* v. *Hathaway*, 534 F.2d 386, 393 (1st Cir. 1976), *cert. denied*, 429 U.S. 819, 97 S.Ct. 64, 50 L.Ed.2d 79 (1976) (permitting conviction, without proof of duress, of Executive Director of municipal Redevelopment Authority who demanded kickbacks from construction contractors). Where the accused is or was an elected official authorized under our system to solicit contributions, however, a fine line may separate a request for support from the sale of a favor. As a sister court has observed, "No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation." *United States* v. *Brewster*, 506 F.2d 62,

81 (D.C.Cir.1974). Consequently, we do not seek to punish every elected official who solicits a monetary contribution that represents the donor's vague expectation of future benefits. We must, nevertheless, discover and penalize those who, under the guise of requesting "donations," demand money in return for some act of official grace.

The demanding of specific contributions in return for specific actions for which the jury convicted Dozier well exemplifies this type of political misconduct. To give as examples only the first two violations alleged in the indictment, the government produced evidence to show that Dozier asked for ten thousand dollars in return for granting a charter to the owner of a livestock auction barn. Loy Weaver, who represented owner Edward Simpson in the charter negotiations, testified that Dozier boasted of his control over the Livestock Sanitary Board, which approves such charters: "If I say issue a charter, they are going to issue a charter." After closeting himself and Weaver, Dozier said that he would help Simpson, continuing "I'm in a position to help these people and they're able to help me." Dozier eventually made his request more specific: "Well, Mr. Simpson is able to help me . . . I think he ought to give me five thousand dollars and his old daddy ought to give me five." While Dozier quickly denied Weaver's protest that he was "putting a fee" on his help, the implication was clear. Simpson eventually received his charter, as well as a phone call from Dozier asking for the money. After Simpson had decided not to send the money, he learned that the livestock board had docketed a hearing on a proposed charter for a rival barn that would greatly decrease the value of his charter.

The rival charter application had been submitted by a group including Floyd Giles, a former Simpson employee. Giles had compiled a record of health violations while operating the auction barn for prior owners, and Dozier had conditioned his agreement to provide a charter on Simpson's discharge of Giles. Giles testified, however, that Dozier later denied responsibility for the firing and offered to help Giles. This help took the form of agreeing to deliver a charter to Giles and his

friends in return for twenty thousand dollars. As Giles put it, "[Dozier told] me to bring him twenty thousand dollars. I asked him about ten. How about me just bringing you ten thousand dollars and give you the other ten thousand when you give me that charter." He said: "I'll go along with that." The charter was not forthcoming, however, because Simpson threatened to publicize Dozier's demands for money and the hearing on Giles' charter never occurred. While Dozier had promised Giles his money back if he failed to obtain the charter, Giles never saw the money again. When pointedly asked by the prosecutor whether his money had been a campaign contribution, Giles responded "Call it no campaign. It was twenty thousand dollars for a livestock charter; and I give him half of it then and was going to give him the other half when I got the charter."

In each instance of misconduct alleged in the indictment, the scenario was roughly the same. Someone would solicit Dozier's aid as Commissioner—assistance in dealing with a state agency, appointment to a state board, a state contract or loan guarantee—and Dozier would name his price. On the basis of many accounts like those of Simpson and Giles, a jury convicted Dozier of wrongfully obtaining or attempting to obtain money "under color of official right."

[4, 5] Yet Dozier complains that the language and prior interpretations of the Hobbs Act do not give "a public official of ordinary intelligence" an adequate description of the conduct proscribed. We find this impossible to accept. In *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 597, 9 L.Ed.2d 561 (1963), the Supreme Court observed:

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. . . . Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. . . . In determining the sufficiency of the notice a statute must of necessity

be examined in the light of the conduct with which a defendant is charged.

Of course, we are mindful that a stricter insistence upon clarity is necessary whenever a criminal statute's "margin" may fade into areas protected by the First Amendment. *E.g. Smith* v. *Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974) (state criminal statute proscribing "contemptuous treatment" of American flag void for vagueness); *Grayned* v. *City of Rockford*, 408 U.S. 104, 109, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972) (city ordinance prohibiting person from making disruptive noise while on ground adjacent to school in session not unconstitutionally vague or overbroad). Still, we remain unconvinced that we will create a snare for the innocent or discourage legitimate fundraising by extending Hobbs Act sanctions to an elected official who conditioned performance of official acts on the payment of fees in the name of contributions. When we evaluate "the sufficiency of the notice" afforded Dozier by the Act "in the light of the conduct" with which he is charged, his sales of influence do not qualify as marginal.

As we observed in *Williams*, *supra*, 621 F.2d at 125, "[i]t cannot be gainsaid that the statute on its face encompasses bribery of a public official, and that 'under color of official right' has a 'meaning, as a legal term of art, [that] is well-defined.' " [2] (Quoting *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), *cert. denied*, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). That term of art comes down to us from the common-law crime of extortion, which consisted of the "corrupt taking of a fee by a public officer, under color of his office, where no fee is due, or not so large a fee is due, or the fee is not yet due." W. LaFave & A. Scott, *Handbook on Criminal Law*, 704 (1972).

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[2] We also relied in *Williams*, 621 F.2d at 125, on the Supreme Court's decision in *United States* v. *Culbert*, 435 U.S. 371, 98 S.Ct. 1112, 55 L.Ed.2d 349 (1978), in which the Court stated that Congress has "conveyed its purpose clearly" in the Hobbs Act and had "intended to make criminal all conduct within the reach of the statutory language." *Id.* at 380, 98 S.Ct. at 1117.

If this technical meaning of the Act is inadequate to apprise an official of ordinary mental competence that he may not demand or accept money in return for requested exercises of his official power, judicial elaborations offer assistance. Perhaps most helpful is *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), *cert. denied*, 421 U.S. 910, 95 S.Ct. 1562, 43 L.Ed.2d 775 (1975), which, while not involving an elected official, placed the following gloss on section 1951:

> The use of office to obtain payments is the crux of the statutory requirement of "under color of official right," and appellants' wrongful use of official power was obviously the basis of this extortion. . . . *It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. § 1951.* That such conduct may also constitute "classic bribery" is not a relevant consideration.

Id. at 151. (Citation and footnote omitted) (emphasis added).

Certainly the application of the Hobbs Act to the type of conduct described in *Trotta*, *supra*, and *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir. 1975), *cert. denied*, 423 U.S. 1014, 96 S.Ct. 446, 46 L.Ed.2d 385 (1975), both decided over six years ago, should have notified any official wishing to skirt the borders of legality that any hint of a *quid pro quo* in soliciting political funds is a dangerous business. The *Mazzei* Court found that a state legislator had violated the Hobbs Act by demanding kickbacks, payable to a "Senate Finance Re-election Committee" from a business that leased office space to the state. After reviewing evidence that the Senator had required lessors to pay ten percent of the lease value into this "re-election" fund, the court concluded "that the evidence . . . justified a finding that the payments to defendants were induced by an exploitation of [the lessor's] reasonable belief that defendant's position as a state senator provided him with effec-

tive control over the state leases here involved. . . ." [3] 521 F.2d at 645. *Trotta*, of course, added the broader interpretation that the benefit exchanged for the extorted fee need not be specific: "Such a *quid pro quo* may, of course, be forthcoming in an extortion case, or it may not. In either event, it is not an essential element of the crime." 525 F.2d at 1100.

We need not even come near to the broader interpretation of the Second Circuit in *Trotta* to place Dozier's misconduct well within the contours of the Act. Trotta, who demanded money from a contractor subject to his influence without specifically identifying the benefit to be conferred, may have been operating on the margin of the law; Dozier, who demanded specific amounts of money for specific favors, clearly was not. [4] He cannot complain, therefore, that extension of the Act to cir-

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[3] More recently, the Third Circuit applied the Hobbs Act to another corrupt leasing scheme. In *United States* v. *Cerilli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 728, 62 L.Ed.2d 728 (1980), officials of the Pennsylvania Department of Transportation had demanded kickbacks from equipment lessors doing business with the state. Rejecting the defendants' excuse that the payments were political contributions and that "the solicitation of political contributions is not only lawful, but is protected by the First Amendment," *id.* at 418, the court concluded that their conduct "constituted extortion regardless of whether the payments went into appellants' pockets or their party's coffers." *Id.* at 420. While the court thus held that "the *coercive* solicitation of political contributions is within the realm of actions that are illegal under the Hobbs Act," *id.* at 421 (emphasis added), it is apparent from the court's brief recital of the facts that it was referring to an ordinary *quid pro quo:* "[T]he defendants required that payments be made as condition to the lessor's equipment being used." *Id.* at 418.

[4] Trotta challenged his conviction under the Act by charging that the indictment was defective "because of its failure to allege 'a specifically identifiable misuse of office,' in which Trotta engaged, as an unlawful *quid pro quo* for a consideration in the nature of official action running from Trotta to [the contractor] in return for the

cumstances like those presented in *Trotia* may make difficult identification of the Act's outer bounds. Since Dozier's conduct "falls squarely within the 'hard core' of the statute's proscriptions," *see Broadrick* v. *Oklahoma*, 413 U.S. 601, 608, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (1973), we adopt the solution of Justice Holmes in *United States* v. *Wurzbach*, 280 U.S. 396, 399, 50 S.Ct. 167, 169, 74 L.Ed. 508 (1930): "[I]f there is any difficulty, which we are far from intimating, it will be time enough to consider it when raised by some one whom it concerns." [5]

[6-9] At the very least, elected officials are, and have been, on notice that any public officer, elected or otherwise, who makes performance (or nonperformance) of an official act contingent upon payment of a fee—whether or not the fee actually is paid or the act actually performed—is guilty of extortion

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payment of the money not lawfully owed." 525 F.2d at 1100. Dozier certainly cannot complain of any similar lack of specificity in his indictment, which was rife with "specifically identifiable" *quid pro quos*.

[5] Quoted in *Broadrick*, *supra*, 413 U.S. at 609, 93 S.Ct. at 2914. Similarly, we are unimpressed with the argument that our action may "chill" legitimate solicitation. Certainly the last ten years of constant litigation in this area does not appear to have produced such paralysis. In any event, we cannot exonerate Dozier for his obviously improper conduct on such an extremely tenuous possibility. As the Court stated in *Broadrick*, in upholding a state statute challenged for vagueness and overbreadth by one whose conduct it clearly proscribed, "there comes a point where that [chilling] effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." 413 U.S. at 615, 93 S.Ct. at 2917-2918.

"under color of official right." [6] Dozier's vagueness challenge must fail.

II. Was The Jury Adequately Instructed On The Difference Between Fundraising And Extortion Or Bribery?

Dozier attacks as reversible error the trial court's refusal to adopt a number of proposed instructions elaborating on the difference between legitimate fundraising and criminal extortion or bribery. We recently summarized our standard for reviewing such allegations as follows:

> The trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented. . . . Equally important, the propriety of a given instruction, or the failure to give a particular instruction, is not received in the abstract; rather, the adequacy of the entire charge taken in the context of the whole trial is our proper scope of inquiry.

United States v. *Pool*, 660 F.2d 547, 558 (5th Cir. 1981) (citations omitted). *See also United States* v. *Ruppel*, 666 F.2d 261 at 273 (5th Cir. 1982); *United States* v. *Kerley*, 643 F.2d 299, 303 (5th Cir. 1981). Our review of the entire charge in its trial context convinces us that Dozier's challenges lacked merit.

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[6] Contrary to Dozier's contention, moreover, we find that the trial court's jury instructions on the Hobbs Act "fairly and adequately cover[ed] the issues presented." *United States* v. *Pool*, 660 F.2d 547, 558 (5th Cir. 1981). The court defined extortion "under color of official right" as follows:

> Extortion under the color of official right is the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion. So, if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question.

[10] First, he contends that the court erroneously rejected an instruction explaining that an official's solicitation of contributions from a person or business subject to his regulation is not unlawful in itself. This instruction was unnecessary, however, since the court told the jury that "[t]he solicitation of campaign contributions from *any person* is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to public office" (emphasis added). Having instructed the jury that "any person" is a legal target for the political fundraiser, the court did not need to inform the jury further that "persons whose financial interests are or might be affected" are a species of "person."

[11] Dozier next submits that the court's instructions on the Hobbs Act left the jury without any guidance as to what is a lawful political solicitation. Inviting us to take judicial notice of the "profound mistrust" that large donations arouse in the minds of many, Dozier asks for a reversal on grounds that the trial court failed to tell the jury that the law does not restrict the size of contributions and that officials may solicit funds, while still in office, for a variety of legitimate purposes. These contentions are groundless. The court specifically instructed the jury that "persons who have been elected" may solicit funds. More important, the court correctly instructed the jury, as we have already noted, regarding the type of conduct *prohibited* by the Act. It was not then incumbent upon the trial judge to enumerate every type of activity that remained permissible.

Finally, Dozier complains that the court erroneously instructed the jury on the relevance of the donor's intent under both the Hobbs Act and the Louisiana bribery statute. The trial court's Hobbs Act instruction required conviction on a showing that the defendant "knowingly and willingly" induced the named persons to part with property by means of extortion. He attacks this instruction on the basis of *United States* v. *Brewster*, 506 F.2d 62 (D.C. Cir. 1974). Reliance upon *Brewster* is misguided. *Brewster* grew out of an alleged infraction of the federal Bribery of Public Officials and Witnesses statute,

18 U.S.C. § 201(c)(1). The instruction disapproved in that decision permitted conviction on a showing that the public official's acceptance of money "was done for or because of acts to be performed by him in his official capacity, and was done *willfully and knowingly* rather than by mistake or accident." 506 F.2d at 81. Suggesting that every politician possesses some "knowledge" of the self-serving expectations that accompany many financial contributions, the court found it improper to hold a public official responsible for *knowing* the motive of a contributor. *Id.*

[12] The case before us, by contrast, involves an extortion charge. The emphasis is on the defendant's own motives rather than on his perception of a potential contributor's motive. The issue is whether Dozier "knowingly and willingly" induced some of his constituents to pay him money by threatening to take or withhold official action, not whether he accepted money as contributions with "knowledge" of a donor's corrupt intent. Under these circumstances, the trial court's instruction on knowing and willful inducement, coupled with its already approved definition of extortion, adequately presented to the jury the elements of this crime.

[13, 14] Dozier's complaint regarding the instructions on the Louisiana bribery statute is similarly groundless. The court charged the jury that its inquiry under the state bribery law was "whether the political contribution is made or solicited not as *quid pro quo* for specific action, but with the intent to influence the conduct of the public servant in relation to his position, employment or duty." According to Dozier, this wording focused the jury's intention on the *donor's* intent. Dozier was the only defendant, however, and the entire trial centered on allegations that he had wrongfully solicited funds. Read in the trial context, therefore, the disjunctive wording "made *or* solicited" adequately informed the jury that the question before them was whether Dozier had solicited contributions with the intent to base his own conduct on the payment or refusal to pay. Moreover, the court already had given the jury a much clearer explanation of intent under the

statute. After discussing specific intent at length, the court instructed the jury as follows:

> Now, the bribery statute includes both the giving or offering to give and the acceptance or offering to accept a bribe. The statute would be violated in a situation where a public officer or any person who has been elected to public office, whether or not such person has assumed the duties of that office, accepts or offers to accept any thing of apparent or prospective value with *specific intent to influence his conduct in relation to his position, employment, or duty* (emphasis added).

We find that these instructions, like the others challenged by Dozier, fairly presented the issues to the jury.

III. Did The Court Erroneously Permit Prosecution Witnesses To Give Conclusory Opinions?

Dozier submits that the trial court erred in permitting government witnesses to give their reasons for having paid, or refrained from paying, the solicited funds. He also alleges that the trial court improperly admitted conclusory lay opinions on his guilt. These complaints are virtually identical, since the witnesses gave as reasons for their refusal or reluctance to pay Dozier a belief that the payments were sought through duress, or represented a bribe, or were "morally wrong."

[15, 16] This court previously has noted that "[t]he victim's fearful state of mind is a crucial element in proving extortion." *United States* v. *Hyde*, 448 F.2d 815, 845 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058, 92 S.Ct. 736, 30 L.Ed.2d 745 (1972). *See also United States* v. *Adcock*, 558 F.2d 397, 403-04 (8th Cir. 1977), *cert. denied*, 434 U.S. 921, 98 S.Ct. 395, 54 L.Ed.2d 277 (1977). State-of-mind evidence is admissible in a trial for extortion under color of official right even though proof of direct coercion is not required. *United States* v. *Craig*, 573 F.2d 513, 520 (7th Cir. 1978), *cert. denied*, 439 U.S. 820, 99 S.Ct. 83, 58 L.Ed.2d 111 (1978). Accordingly, the District Court committed no error in admitting the first-hand testimony of these witnesses regarding their contemporaneous impressions of Dozier's financial demands.

The trial judge cautioned the prosecution early in the trial that it must confine such questioning to "whether or not the feelings that [a witness] had are the feelings or the reasons that he had at that time, and not on reflection at a later date, not now why he did something." After one witness described having felt that Dozier's "assessments" in return for official services were "morally wrong," the court reminded the jury, at the defendant's request, that moral wrong was not among the issues before them. More important, the court explicitly admonished the jury that a witness's opinion on the legal significance of Dozier's conduct was not to guide their application of the law as delivered by the court:

> The fact that the witness feels something, or doesn't feel something is or not a crime is only his opinion. You will be instructed on the law at the close of all the evidence. The facts that you hear at this trial will be used in connection with the law that I give you, not what anybody else says, that is controlling in this case. And based on the law that I give you and your evaluation of the facts, then it becomes your determination as to what was or was not a crime, if any, in this particular case.

[17, 18] The above instructions adequately informed the jury that it was to consider the witnesses' characterization of Dozier's conduct as "extortion" or "blackmail" or "a shakedown" only as evidence of that witness' perception of events as they occurred, not as a conclusive legal opinion. If the defense, having lost the argument on general admissibility, desired a more precise limiting instruction on the extent to which the jury could consider such testimony, it could, and should, have requested one. *See* Fed.R.Evid. 103(a)(1), 105. As given, the court's cautionary remarks were sufficient to cure any prejudice that these otherwise admissible statements might have introduced. [7]

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[7] Certainly these otherwise admissible expressions of a witness's state of mind on hearing Dozier's demands did not become inadmissible merely because they embraced an ultimate issue in the trial. *See* Fed.R.Evid. 704.

IV. Did The Government Fail To Prove That Dozier Conducted The Affairs Of His Enterprise "Through A Pattern Of Racketeering Activities"?

The jury convicted Dozier under Count One of the indictment for having conducted the affairs of the Louisiana Department of Agriculture through a pattern of racketeering activities, in violation of the RICO statute, 18 U.S.C. § 1962(c). RICO makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." Prior to trial, Dozier claimed that the Louisiana Department of Agriculture was not an "enterprise" within the meaning of the statute. Since precedent in this circuit has compelled him virtually to abandon this approach, [8] he now fastens on the word "through" to support his argument that the government failed to prove his guilt under the terms of RICO.

[19] The statutory language "through a pattern of racketeering activities" requires the government to prove, according to Dozier, that his alleged activities "advanced" or "furthered" the interests of his enterprise, the Department. His argument relies primarily on a recent Fourth Circuit decision, *United States* v. *Webster*, 639 F.2d 174 (4th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981), in which that court held "that the prosecution was required to prove that the 'enterprise' . . . had its affairs advanced or benefited in some fashion, direct or indirect, by

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[8] *See, e.g., United States* v. *Brown*, 555 F.2d 407, 416 (5th Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978) (holding municipal police department to be an "enterprise" within meaning of Hobbs Act). *See also United States* v. *Welch*, 656 F.2d 1039 (5th Cir. 1981); *United States* v. *Bright*, 630 F.2d 804, 809 (5th Cir. 1980) (sheriffs' offices held to be "enterprises").

the pattern of racketeering activity." *Id.* at 185-86. In our recent decision considering precisely this issue, *United States* v. *Welch*, 656 F.2d 1039 (5th Cir. 1981), however, we found "the reasoning of the Fourth Circuit, and its interpretation of the word 'through,' to be unduly restrictive." *Id.* at 1060-61. In our view, the government must prove that the predicate offenses and the affairs of the enterprise are related.

> We do not believe that Congress intended virtually to insulate governmental entities, or other legitimate enterprises, which are being operated by means of racketeering activities, from prosecution under section 1962(c) by requiring that the enterprise be benefited by the racketeering activity. Instead, we conclude that by the use of the word "through," Congress intended only to require a sufficient nexus between the racketeering activities and the affairs of the enterprise.

Id. at 1061-62.

[20, 21] *Welch* is fatal to Dozier's position, both in its interpretation of the statutory language and in factual similarity to this case. One of the RICO convictions upheld in *Welch* was that of a county sheriff who had taken money from gamblers in return for overlooking their local operations and from prisoners in return for his use of official discretion to confer special privileges. In finding the necessary link between the "enterprise"—the Sheriff's Office—and the pattern of illegal activity, we noted that it was the power and authority of his office which enabled the sheriff and his confederates "to enter agreements to refuse to enforce the law or to receive payments for the refusal to enforce the law." The offenses were a part of a scheme to use the Sheriff's Office for illicit profit-making activities. [9] *Id.* at 1062.

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[9] At oral argument, counsel for Dozier attempted to distinguish *Welch* by pointing out that the sheriff in that case, once paid, actually used the power of his office to grant favors or carry out threats. Dozier, by contrast, never carried out the promises for which he was paid or retaliated against those who rejected his demands. As we indicated in *Welch*, however, the nexus between office and offense is

[22] Similarly, the offenses that the jury found Dozier to have committed represent a cynical attempt to turn an elective office into a lucrative venture through the sale of official consideration. That Dozier may have planned to spend all or a part of his illegally acquired funds on another campaign for office, thereby plowing the "returns" from his deals back into the ongoing "business" of government, only underlines the vital connection between his office and his offense. Only Dozier's position in the Department of Agriculture and his control over its affairs enabled him to hawk its services for personal gain. The nexus is clear.

V. Was Dozier Entitled To A Change Of Venue?

Dozier next contends that prejudicial pretrial publicity, coupled with misconduct by the U.S. Attorney in charge of the prosecution, entitled him to a change of venue. Principally, he protests what he characterizes as the flagrant misconduct of U.S. Attorney Donald Beckner in attracting press coverage to the grand jury investigation. Included in the record are numerous newspaper reports of Beckner's statements concerning the progress of his investigation. Most are confined to information on the number of witnesses to be called on a given day or the expected date of completion, and most contain refusals to name witnesses who were to testify. As Dozier points out, however, a few report Beckner as having named prospective witnesses,

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complete when the power of office enables one to obtain, or at least attempt to obtain, funds illegally. "Without the power and authority of the Sheriff's Office, the defendants in this case (who were all either members of the Sheriff's Office or were associated with the Sheriff's Office in some way) would have been unable to refuse to enforce the law or to receive payments for their refusal to enforce the law." 656 F.2d at 1062. It is irrelevant to this nexus that Dozier was, in some instances, less than successful in exacting an agreement or, in other instances, less than faithful in carrying out those agreements reached.

a practice specifically forbidden by Federal Rule of Criminal Procedure 6(e) as interpreted by this Court in *In Re Grand Jury Investigation [T. Bertram Lance]*, 610 F.2d 202, 216-17 (5th Cir. 1980). Dozier insists, therefore, that the prosecution's alleged failure to honor our strict policy of preserving the secrecy of grand jury proceedings warrants our granting a new trial, regardless of whether the misconduct resulted in any demonstrable prejudice on the jury panel. The government responds that any abuses which occurred were technical and contained no factual information that could have swayed a potential juror either way.

[23, 24] We do not condone breaches of grand jury secrecy, however "technical." Nevertheless, we cannot accept reversal of an otherwise valid conviction as a remedy for every instance of prosecutorial grandstanding during a grand jury investigation. Certainly we cannot order new trials solely because of newspaper accounts of pretrial statements that have produced no proven or even arguable prejudice to a defendant. "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith* v. *Phillips*, ___ U.S. ___, ___, 102 S.Ct. 940, 947, 71 L.Ed.2d 78 (1982). The less drastic remedy of a contempt citation must serve, therefore, to deter prosecutorial indiscretion at the grand jury level, at least in the absence of prejudice. [10]

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[10] Dozier submits that a defendant is "understandably reluctant" to institute contempt proceedings against the government attorney who must decide whether or not to prosecute him. We note, however, that this is precisely the remedy sought by the defendant in *Lance*, *supra*, 610 F.2d at 209-10. Lance, in fact, persistently requested sanctions against the prosecution, including contempt citations and instructions to the grand jury, throughout the grand jury investigation of his activities. Dozier, by contrast, apparently never sought such appropriate relief from the district court until after the indictment had issued and the damage, if any, was complete.

As for the publicity allegedly traceable to governmental misconduct in this case, a well-established standard governs our determination of whether the effects of pretrial media coverage require a change of venue. In *United States* v. *Capo*, 595 F.2d 1086, 1090 (5th Cir. 1979), *cert. denied*, 444 U.S. 1012, 100 S.Ct. 660, 62 L.Ed.2d 641 (1980), we reiterated our duty to evaluate claims founded on prejudicial pretrial publicity in accordance with the due process standards announced in *Irvin* v. *Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The Supreme Court there held that the constitutional guarantee of a fair trial does not entitle a defendant to a jury wholly ignorant of the facts surrounding his case.

> In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

366 U.S. at 722-23, 81 S.Ct. at 1642-1643. *See also Bronstein* v. *Wainwright*, 646 F.2d 1048, 1051-52 (5th Cir. 1981).

[25, 26] The defendants seeking reversal on grounds of prejudicial pretrial publicity, therefore, normally assumes the burden of proving the existence of actual jury prejudice. *Id.* 366 U.S. at 723, 81 S.Ct. at 1642-1643. *Calley* v. *Callaway*, 519 F.2d 184, 204 (5th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed.2d 760 (1976). In several instances the Supreme Court has adopted a more stringent standard on finding that the sensationalism surrounding a trial necessitated a presumption of jury prejudice. *See, e.g.*, *Sheppard* v. *Maxwell*, 384 U.S. 333, 362, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966); *Estes* v. *Texas*, 381 U.S. 532, 542-43, 85 S.Ct. 1628,

1632-1633, 14 L.Ed.2d 543 (1965); *Rideau* v. *Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963). As we pointed out in *Capo*, 595 F.2d at 1090, however, these were trials "wherein the press saturated the community with sensationalized accounts of the crime and court proceedings, and was permitted to overrun the courtroom, transforming the trial into an event akin to a three-ring circus." There is absolutely no showing, nor even any allegation, that the trial of this case devolved into the type of Punch-and-Judy show depicted in those decisions. Indeed, Dozier complains only of *pretrial* publicity, which creates a smaller danger of prejudice than does sensationalism occurring throughout a proceeding. *See United States* v. *Williams*, 568 F.2d 464, 468 (5th Cir. 1978). Thus, we return to the traditional "actual prejudice" test, under which Dozier must show that community prejudice actually invaded the jury box. *United States* v. *Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975).

[27, 28] The District Court conducted a voir dire of the prospective jurors before refusing the motion for a change of venue. Dozier maintains that the court was insufficiently zealous in sifting out prejudice flowing from news accounts and complains that three-fourths of the twenty-eight empaneled prior to peremptory strikes, had read or heard of allegations against him. As our quotation from *Irwin* v. *Dowd* suggests, however, detection of actual prejudice is not accomplished through juggling statistics, nor is a prospective juror's mere awareness of the allegations or facts to be presented conclusive of his or her unfitness. Our focus must rest upon a juror's willingness and ability to put aside any preconceived notions of guilt or innocence and return a verdict based strictly on admissible evidence. Having completed an independent evaluation of the voir dire in this case, and particularly of the portions to which applicant refers us, we conclude that the trial court did not err in rejecting the petition for a change of venue.

The trial judge conducted an extensive voir dire examination of each prospective juror. He specifically asked each person whether he or she had any personal knowledge of the case,

what he or she knew, and whether this knowledge could impair that person's ability to serve as a fair and impartial juror. Although many recalled having heard or read something about the case, most could recall few details and all—except the three who were struck for cause—indicated that they held no fixed opinion in the case and would render a verdict based solely upon the evidence presented in court. From the nearly ninety persons questioned in this fashion, Dozier points to eight he claims as especially egregious examples of "potential jurors who indicated extensive exposure to publicity." The court excused two of these for cause. A third, Mr. Rager, is the subject of a separate point of error discussed below. The remaining five, without exception, stated that pretrial media reports would not influence their ability to weigh the evidence placed before them.

Mr. Timothy Tandy, for example, remembered having seen television and newspaper coverage of charges made against Dozier during his unsuccessful bid for reelection. He showed only a vague recollection of their substance, however, and his responses to the court's probing demonstrated his ability to remain impartial. Asked whether he could render a fair verdict despite his living near the parents and sisters of Bob Odom, Dozier's political rival and successor as Commissioner, Tandy replied:

> A. I could return either verdict based on what was presented in court and strictly by that. My knowledge of the case, other than just the name of the charges, and descriptions of the acts vaguely, that's all I have.
>
> Q. Do you have any opinion of any kind now about Mr. Dozier's guilt or innocence?
>
> A. No opinion.
>
> Q. Any feeling of any kind or conclusions?
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> A. Just I have—I don't have enough knowledge about it to have any problem or conclusion.

The defense never challenged Tandy for cause, and he eventually served on the jury.

As the government points out, the only instance in which the trial court rejected a challenge for cause by Dozier was that involving Mr. Rager, discussed in Part VI. The answers of the remaining veniremen convinced the trial court, and have convinced us, that these prospective jurors were both willing and able to put publicity and preconceived opinions behind them once they entered the jury box. We are satisfied, therefore, that the District Court's patient and comprehensive questioning resulted in the requisite "fair and disinterested panel of jurors." *Capo*, 595 F.2d at 1092.

VI. Did The Court Commit Manifest Error In Refusing To Excuse Edward Rager?

Finally, Dozier takes particular exception to the trial court's refusal to excuse for cause panel member Edward Rager. He insists that this error forced him to waste on Rager one of the two preemptory strikes that were available to him in the selection of the four alternate jurors. This, in turn, resulted in the seating of an alternate who otherwise would have been struck by the defense and who eventually sat on the convicting jury.

[29] As Dozier notes, our general rule is that "it is error for a court to force a party to exhaust his preemptory challenges on persons who should be excused for cause, for this has the effect of abridging the right to exercise preemptory challenges." *United States* v. *Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976). We also observed in *Nell*, however, that "[w]e have no psychic calibers with which to measure the purity of the prospective juror, rather, our mundane experience must guide us to the impartial jury promised by the Sixth Amendment." *Id.* at 1230. Bearing in mind the difficulties of so imprecise a process, we will set aside a trial court's finding of impartiality only when the error is manifest. *Irvin* v. *Dowd*, *supra*, 366 U.S. at 723-24, 81 S.Ct. at 1642-1643.

Under careful questioning by the trial court, Rager admitted having heard in the news about the charges against Dozier, although he recalled nothing specific. He also confessed to a

threshold impression: "I suppose because the grand jury found reason for a case, I would think that it would make it look more he's guilty than innocent, but I wouldn't make—I could be convinced otherwise, I guess." After further instruction and questioning, however, Rager showed an understanding that he was not to consider the indictment as evidence and that Dozier was presumed innocent until proven guilty. To later inquiries on whether the indictment or pretrial news stories would impair his ability to decide the case solely on the evidence presented at trial, Rager responded "I don't think so."

Once the court had finished its questioning, counsel for Dozier expressed concern about Rager's reluctance to give unqualified answers. The court agreed to call Rager back, and the second period of questioning included the following exchange:

Q. [I]f you were chosen to serve as a juror in this case, could you perform that duty and obligation and accord each side a fair, impartial, unbiased verdict, based solely on the evidence presented at the trial of this case?

A. I believe so.

Q. Okay, believe it, now, I don't want you to say you believe so. Can you be sure, yes or no, that you could do that?

A. I guess I could be absolutely sure.

Q. What reservation would you have, or what problem would you have in deciding the case based solely on the evidence presented at the trial?

A. Well, again, I would think I would be able to do that. If anything hindered it, it would be unconsciously something I heard before. I wouldn't think it would effect me, but I just can't be sure. You know—

Q. Let me ask you this way. Would you intentionally consider anything that you've heard prior to the trial of this case in reaching your verdict?

A. No.

Q. Could you base your decision based, as far as humanly possible, could you base your decision, and would you base your decision based solely on the evidence and law presented at the trial of this case?

A. Yes.

Q. Do you have any opinion at all now as to the guilt or innocence of the defendant?

A. Well, just what I said before, when I first heard the charges I thought it was maybe because of the campaign. But when they came up again, I thought maybe there was something to them.

Q. Do you understand that the burden rests with the United States to prove Mr. Dozier is guilty beyond a reasonable doubt? Do you understand that?

A. Yes, sir.

Q. You understand that Mr. Dozier does not have to present any evidence. He has a right to remain silent throughout the trial, and he does not have to present any evidence, testimony, or any other type of evidence in the case to prove that he is innocent. Do you understand that?

A. Yes.

Q. The burden always remains with the government. Would you require that Mr. Dozier prove himself innocent or would you—let me ask you that question first. Would you require that Mr. Dozier prove himself innocent based on your feelings about this case?

A. No.

Q. Would you be able to accord to Mr. Dozier his constitutional right that he has, the right to be presumed innocent until proven guilty, the right to remain silent throughout the trial with no presumptions at all arising from those constitutional rights?

A. Yes.

Q. Could you—again I ask you this question. I hate to belabor it, but I want to be—I don't want to keep calling you back in here. Could you, to the best of your ability, decide this case based solely and only on the

evidence presented at the trial of this case, and not based on any newspaper, radio, or any other accounts that you may have heard prior to coming to the court?

A. Yes, sir.

Q. Are you certain that you can do that?

A. Well—

Q. Insofar as humanly possible?

A. Yes, sir.

The trial judge then refused to excuse Mr. Rager for cause, giving this explanation of his ruling:

> Well, I'm satisfied from hearing his testimony, both initially and afterward, that he could render a fair verdict in this case; he could afford Mr. Dozier all of his constitutional rights, both the presumption of innocence and also to not require Mr. Dozier to present any evidence at all. I think the man is just trying to be honest, and couldn't say what subconsciously would happen, but he wouldn't intentionally at all consider any evidence outside the record of this case, but would base his decision based solely on the evidence presented and the law presented at the trial.

[30] We find this an acceptable construction of Rager's responses to the voir dire and are unable to conclude that the court's refusal to excuse Rager amounts to an abuse of discretion. *See United States* v. *Apodaca*, 666 F.2d 89 (5th Cir. 1982). Rager was temperamentally disinclined to yield categorical answers, as the response "I guess I could be absolutely sure" amply demonstrates. Still, his remarks on his ability to shut out prior impressions do not suggest prejudice or a fixed opinion so much as an unusually candid skepticism toward human capacity for emptying the subconscious at a moment's notice. Moreover, his admission to a pretrial impression that a grand jury indictment "make[s] it look like he's more guilty than innocent" is hardly an unalterable, or even unusual, notion. Probably many laymen hold such an exalted view of indictments until cautioned otherwise.

American judicial opinion on this subject very nearly begins with Chief Justice Marshall's dictim that "light impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror." 1 Burr's Trial 416 (1807) (quoted in *Irvin* v. *Dowd*, 366 U.S. at 722, n.3, 81 S.Ct. at 1642 n.3). Under the court's questioning and instruction, Rager agreed to put aside prior impressions, to accord the presumption of innocence and the right to silence, and to consider only the evidence presented at trial "insofar as humanly possible." We can ask no more of those who must assume, for the duration of a trial, the almost superhuman posture of complete impartiality.

CONCLUSION

In sum, we conclude that Gilbert Dozier received a fair trial before a properly selected and correctly instructed jury. The judgment below must be affirmed in all respects.

AFFIRMED.

APPENDIX B

UNITED STATES OF AMERICA

v.

GILBERT L. DOZIER

Crim. No. 80-02-B.

United States District Court,
M. D. Louisiana.

July 30, 1980.

On defendant's motion to dismiss first count of indictment, the District Court, Polozola, J., held that Louisiana Department of Agriculture was an "enterprise" within the meaning of Racketeer Influenced and Corrupt Organizations Act.

Motion denied.

Donald L. Beckner, U.S. Atty., Mitchell B. Lansden, Ian F. Hipwell, Asst. U.S. Attys., Baton Rouge, La., for plaintiff.

Camille Gravel, Alexandria, La., E. Drew McKinnis, McKinnis, Juban & Bevan, Baton Rouge, La., William H. Jeffress, Jr., Miller, Cassidy, Larroca & Lewin, Washington, D.C., for defendant.

POLOZOLA, District Judge.

The defendant, Gilbert L. Dozier, has filed a motion to dismiss Count I of the indictment on the grounds that the Department of Agriculture is not an "enterprise" as defined in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, et seq. No oral argument is required on this motion.

The Court finds that the Louisiana Department of Agriculture is an enterprise within the meaning of 18 U.S.C. § 1961(4).

Therefore, defendant's motion to dismiss Count I of the indictment must be denied. *United States* v. *Bright*, 78-5472 (5 Cir. July 11, 1980); *United States* v. *Brown*, 555 F.2d 407 (5 Cir. 1977), certiorari denied 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978); *United States* v. *Baker*, 617 F.2d 1060 (4 Cir. 1980); *United States* v. *Grzywacz*, 603 F.2d 682 (7 Cir. 1979); *United States* v. *Frumento*, 563 F.2d 1083 (3 Cir. 1977); *United States* v. *Bacheler*, 611 F.2d 443 (3 Cir. 1979); *United States* v. *Vignola*, 464 F. Supp. 1091 (E.D.Pa. 1979); aff. mem., 605 F.2d 1199 (3 Cir. 1979); *United States* v. *Altomare*, 625 F.2d 5 (4 Cir. July 17, 1980); *United States* v. *Barber*, 476 F. Supp. 182 (S.D.W.Va. 1979).

Therefore:

IT IS ORDERED that defendant's motion to dismiss Count I of the indictment be and it is hereby DENIED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-3927

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GILBERT L. DOZIER,
Defendant-Appellant.

FILED May 13 1982

Appeal From The United States District Court
For The Middle District Of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 8, 5 Cir., 1982, ____ F.2d ____).
(May 13, 1982)

Before WISDOM, SAM D. JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 3b Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT

/s/ J. S. Williams
J. S. WILLIAMS
United States Circuit Judge

APPENDIX D

UNITED STATES OF AMERICA

v.

GILBERT L. DOZIER

Crim. No. 80-02-B.

United States District Court,
M. D. Louisiana.

Minute Entry:
November 5, 1980
Polozola, J.

The defendant, Gilbert L. Dozier, has filed a motion for a new trial and a motion for a judgment of acquittal. No oral argument is required on these motions.

For reasons previously assigned in pre-trial motions or during the trial of this case, defendant's motion for a new trial and defendant's motion for a judgment of acquittal must be denied. The Court reserves the right at a later date to supplement its prior rulings by filing additional written reasons in the record of this case.

Therefore:

IT IS ORDERED that the motions of Gilbert L. Dozier for a judgment of acquittal and for a new trial be and each is hereby DENIED.

/s/ Frank J. Polozola
FRANK J. POLOZOLA
United States District Judge

FILED
SEP 30 1982
CLERK

No. 82-6

In the Supreme Court of the United States

OCTOBER TERM, 1982

GILBERT L. DOSIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

D. LOWELL JENSEN
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QUESTIONS PRESENTED

1. Whether the Hobbs Act, 18 U.S.C. 1951, requires proof of force, threats or fear to establish an extortion committed "under color of official right."

2. Whether the Hobbs Act's proscription of extortion "under color of official right" is void for vagueness.

3. Whether a government agency is an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-60

GILBERT L. DOZIER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 672 F.2d 531.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1982, and a petition for rehearing was denied on May 13, 1982 (Pet. App. 33a-34a). The petition for a writ of certiorari was filed on July 12, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted of conducting the affairs of the Louisiana Department of Agriculture through a pattern of racketeering activity (Count 1), in violation of 18 U.S.C. 1961; and of obstructing interstate commerce by extortion (Counts 2, 3 and 5), in violation of 18 U.S.C. 1951 (the Hobbs Act). He was fined $25,000 on Count 1 and sentenced to consecutive terms of five years' imprisonment on Counts 1 and 2. He was placed on five years' probation on Count 3, and imposition of sentence was suspended on Count 5. The court of appeals affirmed in a comprehensive opinion (Pet. App. 1a-30a).

1. The evidence at trial showed that from 1976 through 1980, petitioner was the Commissioner of Agriculture of Louisiana, an elective office. During this period, he solicited funds from persons or businesses that were affected by the Department of Agriculture. In return for those payments, petitioner promised to aid the extortion victims by his official actions. If the requested payments were withheld, however, he threatened to treat the victims unfavorably. As the court of appeals summarized (Pet. App. 9a), "[s]omeone would solicit [petitioner's] aid as Commissioner—assistance in dealing with a state agency, appointment to a state board, a state contract or loan guarantee—and [petitioner] would name his price."

For instance, Floyd Giles hoped to obtain a charter to open a livestock auction barn from the state Livestock Board. Petitioner, who had boasted to others that he controlled the Board, instructed Giles to bring $20,000 to a meeting at which they would discuss the

matter (Pet. App. 8a-9a). Giles told petitioner that he would bring $10,000 to the meeting and would pay the remaining $10,000 when he got the charter. Petitioner accepted the $10,000, and promised to give it back to Giles if the charter were not obtained. No charter was obtained, but the money was never returned (*id.* at 9a).[1]

Louisiana milk processors asked petitioner to lower the price of Louisiana milk to forestall the influx of cheaper milk from Mississippi. In return, petitioner demanded $200,000—$10,000 from each major processor and $5,000 from the smaller processors (Tr. 1433-1437, 1615-1618, 1630-1631).[2] He also promised to make the person serving as the conduit for the payment a member of the Dairy Stabilization Board (Tr. 1625).[3]

Alvin Burger, the president of a pest control company, was experiencing certain difficulties with the Louisiana Structural Pest Control Commission (Tr. 262-269). Petitioner promised to help Burger with his problems before the Commission in exchange for a $20,000 political campaign contribution. Burger agreed to the payoff but later withdrew (Tr. 278, 281).[4]

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[1] This act of extortion was the subject of the Hobbs Act violation charged in Count 2.

[2] "Tr." references are based on transcript references in the government's brief in the court of appeals.

[3] This extortionate scheme was the subject of the Hobbs Act violation charged in Count 3.

[4] This demand constituted the Hobbs Act violation charged in Count 5. In addition to the extortions charged in the three Hobbs Act counts, the RICO count enumerated nine other similar incidents.

ARGUMENT

1. Petitioner first contends (Pet. 10-13) that the Hobbs Act, 18 U.S.C. 1951, prohibits extortions committed "under color of official right" only if they are accomplished by "threats, fear, or duress." This claim is answered by the plain language of the statute. Section 1951(b)(2) (emphasis added) defines extortion as

> the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, *or* under color of official right.

It is clear from the use of the disjunctive that Congress prohibited alternative means of extorting property, and the courts of appeals have consistently so held. *United States* v. *Williams*, 621 F.2d 123, 124 (5th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *United States* v. *Cerilli*, 603 F.2d 415, 425-426 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Harding*, 563 F.2d 299, 305-306 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *United States* v. *Brown*, 540 F.2d 364, 371-372 (8th Cir. 1976); *United States* v. *Hall*, 536 F.2d 313, 320-321 (10th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *Hathaway*, 534 F.2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819 (1976); *United States* v. *Trotta*, 525 F.2d 1096, 1100 n.7 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976); *United States* v. *Braasch*, 505 F.2d 139, 151 n.8 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975); *United States* v. *Kenny*, 462 F.2d 1205, 1229 (3d Cir.), cert. denied, 409 U.S. 914 (1972). As the Fifth Circuit previously recognized (*United States* v. *Williams*, *supra*, 621 F.2d at 124), "[t]he coercive element is supplied by the existence of the public office itself." For

this reason, even at common law, a public official could be convicted of extortion without proof of threats, force or duress. See *United States* v. *Nardello*, 393 U.S. 286, 289 (1969); *United States* v. *Williams*, *supra*, 621 F.2d at 124.

2. Petitioner further contends (Pet. 13-19) that even if the Hobbs Act is properly construed as reaching extortion "under color of law" without proof of threats, force or duress, it is unconstitutionally vague as applied to solicitations of political contributions. Distilled to its essence, however, the question raised by petitioner is more accurately framed as whether the court of appeals correctly construed the district court's instructions as directing the jury to convict petitioner on the Hobbs Act counts only if they found that he had solicited sums of money in exchange for specific instances of official action or inaction.[5] Such a question, tied to the language of this particular set of instructions, is not one of general importance warranting review by the Court. In any event, the court of appeals correctly construed the district court's instructions.

After reading to the jury the statutory definition of extortion (18 U.S.C. 1951(b)(2)), *i.e.*, "the ob-

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[5] Petitioner initially contends (Pet. 13-15) that the generally accepted theory of "under color of official right" extortion—that a government official may be convicted simply upon a showing that he took fees to which his office did not entitle him and the giving of which was motivated by the authority of his office—may not constitutionally be applied to an elected official who must solicit contributions for his campaigns. Petitioner concedes (Pet. 15-16), however, that the court of appeals found it unnecessary to decide this question, since it concluded that petitioner was properly convicted for taking sums of money in exchange for specific official actions. Accordingly, petitioner's claim reduces to a contention that the court of appeals misconstrued the district court's instructions to the jury that convicted him (see Pet. 17-19).

taining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," the court defined the different ways in which the statute could be violated, including the taking of money "under color of official right" (App., *infra*, 1a-3a).[6] Read as a whole, tne instruction concerning this latter phrase clearly required the jury to find that petitioner had made a specific use of his official powers to induce a contribution (*id.* at 2a-3a; emphasis added):

> Extortion under the color of official right is the *wrongful* taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, *the wrongful use* of otherwise valid official power may convert dutiful actions into extortion. So, *if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question.*

The court also made it clear to the jury that the solicitation of campaign contributions, standing by itself, is "a lawful and permissible political activity" (*id.* at 4a): "The solicitation of campaign contributions is a necessary and permissible form of political activity on the part of persons who seek political office and persons who have been elected to public office. However, campaign contributions can be the subject of public bribery and extortion *provided the essential*

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[6] We have attached the entire Hobbs Act charge as an appendix.

elements of these offenses are proven beyond a reasonable doubt" (Tr. 3270-3271; emphasis added). Such solicitations thus could provide the basis for a conviction for extortion only if they were accompanied by the "wrongful use of otherwise valid official power" (App., *infra*, 3a). Under these instructions, the jury was clearly directed that it could convict on the Hobbs Act counts only if it found that petitioner had wrongfully exercised the powers of his office to obtain money; it could not find him guilty simply because, in his capacity as an officeholder, he had solicited political contributions from persons in an industry regulated by his office. The court of appeals therefore correctly sustained the instructions (Pet. App. 14a-17a). See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).[7]

3. Petitioner also attacks (Pet. 7-9) his RICO conviction. He contends (Pet. 19-23) that the Louisiana Department of Agriculture is not an "enterprise," as that term is defined in 18 U.S.C. 1961(4).[8] But the courts of appeals uniformly have held that a public office or governmental entity can be a RICO enterprise, and this Court consistently has

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[7] Moreover, this is not a case that even arguably involved mere campaign solicitations. Rather, the evidence overwhelmingly revealed a clear pattern of petitioner's demanding payments for specific exercises of his official power. Thus, he demanded $20,000 from Giles in exchange for an auction barn charter; he demanded $20,000 from the milk processors in exchange for the reduction of the price of milk; and he sought $20,000 from Alvin Burger as a fee for intervening on Burger's behalf before the Structural Pest Control Commission. See pages 2-3, *supra*.

[8] Section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity * * *."

denied petitions for certiorari raising this issue. See, *e.g.*, *United States* v. *Thompson*, Nos. 81-5176, *et al.* (6th Cir. Aug. 4, 1982), petition for cert. pending, No. 82-5440 (en banc) (governor's office);[9] *United States* v. *Angelilli*, 660 F.2d 23, 30-35 (2d Cir. 1981), cert. denied, No. 81-1237 (Feb. 22, 1982) (civil court); *United States* v. *Sutherland*, 656 F.2d 1181, 1198 (5th Cir. 1981), cert. denied, No. 81-1289 (Feb. 22, 1982) (municipal court); *United States* v. *Lee Stoller Enterprises, Inc.*, 652 F.2d 1313, 1316-1319 (7th Cir.) (en banc), cert. denied, No. 81-396 (Nov. 30, 1981) (sheriff's office); *United States* v. *Long*, 651 F.2d 239, 241 (4th Cir.), cert. denied, No. 81-281 (Oct. 13, 1981) (state senator's office); *United States* v. *Clark*, 646 F.2d 1259, 1261-1267 (8th Cir. 1981) (office of county judge); *United States* v. *Bacheler*, 611 F.2d 443, 450 (3d Cir. 1979) (traffic court).

This long line of authority is bottomed on the plain language of the statute itself. Clearly, the Louisiana Department of Agriculture falls within the "legal entity" component of the definition of "enterprise." See 18 U.S.C. 1961(4). As this Court held in *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." Moreover, petitioner points to no "clearly expressed legislative intent" to exclude governmental entities, and therefore the unambiguous statutory language must prevail. *Ibid.*

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[9] The en banc Sixth Circuit thus has overruled the only court of appeals' decision on which petitioner relies and that he cites as creating a conflict among the circuits on this issue (Pet. 20-23).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

SEPTEMBER 1982

APPENDIX

I shall now instruct you on the law pertaining to the federal extortion statute.

Title 18, United States Code, Section 1951(a) provides in part that: "whoever in any way or degree obstructs[,] delays, or affects commerce or the movement of any article or commodity in commerce by extortion" shall be guilty of an offense against the United States.

There are three essential elements which must be proved beyond a reasonable doubt in order to establish the offense proscribed by this law:

First: That the defendant induced the person described in the indictment to part with property;

Second: That the defendant did so knowingly and willfully by means of extortion; and

Third: That the extortionate transaction delayed, interrupted or adversely affected interstate commerce.

Section 1951 prohibits extortion as well as the attempt to commit extortion. Thus, the Government bears the burden of proving beyond a reasonable doubt that the defendant was either guilty of extortion or guilty of attempting to commit extortion. An attempt to commit extortion is shown when the Government proves beyond a reasonable doubt that the defendant willfully attempted to obtain property from another through the use of actual or threatened force, violence or fear, or under the color of official right. It is not necessary that the attempt to extort be successful or that any property was actually obtained by the defendant.

Extortion means the obtaining of property from another, with his consent, induced by wrongful use

of actual or threatened force, violence or fear, or under color or official right.

The term property includes not only money or other tangible things of value, but also includes any intangible right considered as a source or element of income or wealth.

The term fear means a state of anxious concern, alarm or apprehension of harm, and it includes fear of economic loss or damage as well as fear of physical violence. The fear need not have been actually caused by the defendant. The statute is satisfied if the defendant intended to exploit the fear.

The Government does not have to show either that the fear was a direct consequence of the threat of economic loss or that the victim personally feared the defendant. It is not necessary that the Government show that there were any explicit demands for personal payoffs or explicit threats of adverse consequences if the payment is not made. Subtle extortions are covered under the federal extortion act and the Government satisfies its burden of proof if it shows circumstances surrounding the alleged extortionate conduct that rendered the victim's fear of threatened loss reasonable.

Threatening to take official action, even where it is action that the public official is duty bound to take, for the purpose of coercing the victim to pay the public official can be extortion if the Government satisfies its burden of proving each essential element of the offense beyond a reasonable doubt.

The term wrongful means the obtaining of property unfairly and unjustly by one having no lawful claim thereto.

Extortion under the color of official right is the wrongful taking by a public officer of money or

property not due him or his office, whether or not the taking was accomplished by force, threats, or use of fear. In other words, the wrongful use of otherwise valid official power may convert dutiful actions into extortion. So, if a public official threatens to take or withhold official action for the wrongful purpose of inducing a victim to part with property, such a threat would constitute extortion, even though the official was already duty bound to take or withhold the action in question.

While it is not necessary to prove that the defendant specifically intended to interfere with interstate commerce, it is necessary as to this issue that the Government prove that the natural consequences of the acts alleged in the indictment would be to delay, interrupt or adversely affect interstate commerce, which means the flow of commerce or business activities between two or more states.

The term commerce, as used in this statute, deals with interstate commerce, that is commerce between the states.

It is not necessary that the subject of the extortion constitute interstate commerce or that the purpose of the extortion be to affect interstate commerce, or that the defendant intended to affect interstate commerce. All that is required is that trade or commerce be affected by the extortion in any way, or that the unlawful conduct obstructed, delayed, affected interstate commerce or the movement of commodities in such commerce.

The effect of extortion on commerce does not have to be simultaneous with the extortion. A threatened effect on interstate commerce is sufficient to bring the statute into play regardless of the absence of any actual effect.

It is the duty of the judge and not the jury to determine whether the Government's evidence established that interstate commerce was affected. You need only decide whether you believe beyond a reasonable doubt the evidence offered by the Government to establish an effect on interstate commerce. Therefore, I instruct you that if you believe the evidence offered on interstate commerce, the requisite effect upon interstate commerce has been met.

As you know, the parties have introduced testimony regarding alleged campaign contributions. It is for you to determine, based on the facts of this case and in accordance with the instructions I have just given to you relating to the federal extortion statute, whether the payment and/or solicitation of campaign contributions constitutes a violation of the federal extortion statute or was a lawful and permissible political activity.

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